No. 9251.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,
Appellants,

vs.

WINSTON BROS. COMPANY, a corporation,
Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,
Appellant,

vs.

WINSTON BROS. COMPANY, a corporation,
Appellee.

REPLY BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

CHURCH & JARDINE,
J. W. FREEMAN,
J. P. FREEMAN,
ERNEST ABEL,
Attorneys for Appellant,
Brady Irrigation Company.

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Upon Appeal from the District Court of the United States, for the District of Montana.

ARGUMENT

Counsel for appellee, on page 8, and again on page 48, of their brief, contend that neither the water appropriated and diverted by Teton Cooperative Reservoir Company, nor the stock which entitles the owners to a certain proportion of such water, is appurtenant to the land. This argument is based upon the fact that neither the Brady Irrigation Company or the Bynum Irrigation District own any land to which water or stock could become appurtenant.

In Paragraph VI of the Complaint of Brady Irrigation Company, it is alleged that the Teton Cooperative Reservoir Company, ever since its organization has been and is now operated solely and only for the purpose of delivering water for irrigation and domestic purposes for the irrigation of lands owned or controlled by its stockholders. Its only income has been derived from assessments levied against its outstanding capital stock and the proceeds of sales of the same. The money thus obtained has been used only for the purpose of constructing, maintaining and repairing the irrigation facilities (R. p. 7). In Paragraph IX of the Complaint of the Brady Irrigation Company it is alleged that the Teton Cooperative Reservoir Company has constructed on the lands held by it, certain irrigation works for the sole purpose of storing and supplying water for irrigation and domestic purposes to its stockholders, which had theretofore been appropriated by it (R. p. 10). It is clear from the allegations of the Complaint that the Teton Cooperative Reservoir Company never at any time since its organization, used any of the water which was appropriated by the Company for irrigation purposes on land owned by this Reservoir Com-

pany. The purpose of its organization was to supply water to its stockholders. It has been repeatedly held in Montana that an appropriator of water for irrigation purposes need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes. Toohey vs. Campbell, 24 Mont. 13, 60 Pac. 396; Smith vs. Denniff, 24 Mont. 20, 60 Pac. 398; Bailey, et al. vs. Tintinger, et al., 45 Mont. 154; Thomas, et al. vs. Ball, et al., 66 Mont. 161, 213 Pac. 597; St. Onge, et al. vs. Blakely, et al., 76 Mont. 1, 245 Pac. 532.

In Bailey, et al. vs. Tintinger, 45 Mont. 154, 122 Pac. 575, Lee, Hall and Hatch filed notices of appropriation of 5000 inches of water of Big Timber Creek in 1892, and commenced construction of a distributing system. This appropriation was for the purpose of irrigating lands upon which they had some claim, as well as to sell, rent and otherwise distribute water to other persons. Some work was commenced on the construction of a distributing system by the three appropriators. Thereafter, Hatch succeeded to the interests of Hall and Lee, and continued the work to such an extent that small quantities of water were used during 1894 through the main canal. In 1895, one Wormser succeeded to the rights of Hatch. About the time that Wormser succeeded to the rights of the appropriators, Holland Irrigation Canal Company was organized under the laws of the State of Montana, for the purpose of constructing a canal system upon the north fork of Big Timber Creek to irrigate lands lying in the vicinity and to sell, rent or otherwise dispose of water for irrigation and other purposes.

Immediately after its organization, Holland Irrigation Canal Company succeeded to the rights of Wormser, and thereafter, extended the main canal until it was approximately eight to ten miles long, and substantially completed. By mesne conveyances, Glass-Lindsay Land Company, a corporation, became the owner of the rights acquired by the Holland Irrigation Canal Company and thereafter did considerable work on one section of the canal. The Glass-Landsay Land Company was organized under the laws of the State of Montana with authority to purchase or construct an irrigation system and to sell, rent or otherwise dispose of water for the irrigation of lands lying immediately tributary to the main canal. In the action to determine the relative rights of parties to the use of waters of Big Timber Creek and its tributaries, one of the principal questions which arose in the case was whether or not a corporation which does not own, control or possess any land can make a valid appropriation of water for irrigation purposes, when organized for the purpose of selling or renting water to settlers. Mr. Justice Holloway, in disposing of this question, said:

> "To deny the right of a public service corporation to make an appropriation independently of its present or future customers and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, for the United States must proceed in

making appropriations of water (from the non-navigable streams of this state at least) as a corporation or individual. (Rev. Codes, sec. 4846; United States v. Burley (C. C.), 172 Fed. 615; Burley v. United States, 179 Fed. 1, 102 C. C. A. 429).

It is clearly the public policy of this state to encourage these public service corporations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy.

It is impossible to harmonize the decisions of the courts upon the subjects presented. Respectable authority can be found holding contrary to our view; but upon a consideration of our statutes, the history of the law of appropriation, and the public policy of this state, we base our conclusion that, as to a public service corporation, its appropriation is complete when it has fully complied with the statute and has its distributing system completed and is ready and willing to deliver water to users upon demand, and offers to do so. The right thus obtained may be lost by abandonment or nonuser for an unreasonable time (1 Wiel, sec. 569), but cannot be made to depend for its existence in the first instance upon the voluntary acts of third parties—strangers to its undertaking. The appellant here is a public service corporation (State ex rel. Milsted v. Butte City W. Co., 18 Mont. 199, 56 Am. St. Rep. 575, 32 L. R. A. 697, 44 Pac. 966; Gutierres v. Albuquerque L. & I. Co., 188 U. S. 454, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; 2 Wiel, sec. 1260), as were its immediate predecessors, while the original appropriators of the right claimed by appellant were private individuals.

If our statute does not by express terms, it does by fair implication, require that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. (Power v. Switzer, 20 Mont. 523, 55 Pac. 32; Toohey v. Campbell, above; Miles v. Butte Electric & Power Co., above; Smith v. Duff, above.) The law will not encourage anyone to play the part of the dog in the

manger, and therefore the intention must be bonafide and not a mere afterthought. (Nevada County & S. C. Co. vs. Kidd, 37 Cal. 282.)

The language of Mr. Justice Holloway to the effect that a right obtained by a public service corporation organized for the purpose of supplying water to landowners may be lost by abandonment or nonuser for an unreasonable time, is significant. The appropriation can be made by such corporation but if the purpose of its organization is carried out, the water can only be applied to a beneficial use by landowners obtaining water from such a corporation. Unless the water is applied to a beneficial use within a reasonable time it may be lost by reason of an abandonment or nonuser. Therefore, to recognize the right of such a corporation to make a valid appropriation, the Court must have recognized the right of the corporation to transfer the right to use such water and its irrigation facilities to one who can apply such water to a beneficial use. A transfer of such a right from such a corporation to the user of the water would certainly be a transfer of an easement in the water right and irrigation facilities.

In Brennan vs. Jones, 101 Mont. 550, 55 Pac. (2d) 697, it was held that where an irrigation company, such as the Teton Cooperative Reservoir Company in the instant case, conveyed to a water company supplying the needs of the town, 350 inches of water, and the needs of the town required only 65 inches, the irrigation company was not entitled to the unused portion of the 350 inches thus conveyed, but that the irrigation company

was obliged to turn such unused portion back into the stream from which said water was diverted for use of subsequent appropriators. In other words, the water conveyed by the irrigation company to the water company, consisting of 350 inches, was conveyed for a specific purpose. If such purpose did not require all of the 350 inches, the surplus not so required could not be used for any other purpose by the irrigation company. This rule cannot be upheld on any other ground than that the water conveyed by an irrigation company can only be used as an appurtenance for a particular purpose. The right to the use of the same being limited to the extent of the conveyance.

In the instant case, the By-laws of both the Teton Cooperative Reservoir Company and the Brady Irrigation Company are to the effect that each share of stock of these companies entitles the holder thereof to the use during the irrigation season of certain portions of the water rights and irrigation facilities of the corporations. We pointed out in our first Brief that these By-laws were the foundation for an enforceable contract, and since there is no limit as to time in which these By-laws may be enforced against the corporation by their stockholders, the issuance of a share of stock in effect amounted to a grant of the right to the use of the water appropriated and the irrigation facilities used in distributing such water.

The construction of the irrigation system of the Teton Cooperative Reservoir Company ordinarily would be too great an undertaking for an individual. The corporation

was therefore organized to serve many individuals. The same is true of the Brady Irrigation Company. The Brady Irrigation Company is merely an agency organized to distribute water to the landowners who own shares of stock in this company. When a share of stock of the Brady Irrigation Company is issued, this Company, by reason of the provisions of the By-laws set forth in full in the complaint, transfers an interest in the irrigation facilities and the water appropriated and distributed by means of the corporations. A share of stock of the Brady Irrigation Company is merely a link in the chain of the title of such owner to a portion of the water and irrigation facilities of the reservoir company. We submit that whether the landowners are stockholders of the Teton Cooperative Reservoir Company, or of the Brady Irrigation Company, their rights would be the same with respect to the water appropriated and the irrigation facilities constructed by the Teton Cooperative Reservoir Company.

In support of contention of counsel for appellee, counsel cite several Colorado decisions to the effect that a deed to land irrigated by means of ownership of stock in an irrigation company does not convey the grantor's water stock. The case of First National Bank of Longmont vs. Hastings, 7 Colo. A. 129, 42 Pac. 691, is one of the cases cited. This case was also cited in the Brief of counsel for the respondent at Page 76 of Vol. 88 of the Montana Reports, in the case of Yellowstone Valley Company vs. Associated Mortgage Investors, Inc., et al., 88 Mont. 73, 290 Pac. 255. Mr. Chief Justice Callaway,

who wrote the decision of the Supreme Court of Montana in the Yellowstone Valley Company case, in referring to these Colorado cases, said:

> "The doctrine announced in the foregoing cases is suited to our history and conditions and meets with our approval. Defendant's counsel cite decisions from the supreme court of Colorado to sustain the decision of the lower court, but with these we are unable to agree."

Therefore, the Colorado cases relied upon by appellee can have no application to the instant case for the reason that the Supreme Court of Montana has specifically disapproved of the rules announced therein.

It is contended by counsel for appellee that the appellant, Brady Irrigation Company, is estopped to enjoin an execution in this case and is entitled to none of the other remedies which might be granted under the Complaint, for the reason that it would be inequitable to grant any relief. Counsel contend in their Brief that since the stockholders, including the Brady Irrigation Company, have taken advantage of the benefits of the contract for enlarging the reservoir upon which the judgment of Winston Bros. Company is based should not be granted any relief because it would be inequitable. We have pointed out in our first Brief that the indebtedness to Winston Bros. Company was incurred by the Teton Cooperative Reservoir Company for the sole purpose of providing water for the Bynum Irrigation District. All the benefits derived from the enlargement of this reservoir were for the purpose of supplying water to the irrigation district. It is alleged in the Complaint that the By-

num Irrigation District, ever since the making and entry of the judgment was and is now bankrupt and hopelessly insolvent (R. p. 14). Therefore, in order to prevent the sale of the irrigation facilities under a Writ of Execution the Brady Irrigation Company would be compelled to pay the whole of the judgment. It is only a minority stockholder, yet in spite of the fact that it derived none of the benefits from the enlargement of the reservoir, it would be compelled to shoulder all of the burden. Certainly any enforcement of the judgment by a Writ of Execution would be inequitable, so far ts the Brady Irrigation Company is concerned.

In connection with the argument under the title of estoppel, counsel for appellant contend that the Federal Courts will not prevent a sale of property under a Writ of Execution issued on a judgment rendered by a State Court. The decision in the cases cited by counsel on page 57 of appellee's Brief were no doubt based on 28 U. S. C. A. 379, providing as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. pp. 720; Mar. 3, 1911, c. 231, pp. 265, 36 Stat. 1162.)"

The statute in question has been construed in a number of cases and it is generally held that a Federal Court having jurisdiction of the parties to a cause has the power as a court of equity upon grounds of equitable cognizance to enjoin the enforcement of a final judgment at law in a State Court upon the usual principles under which the

courts of equity will enjoin the enforcement of a judgment. The Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills, 278 Fed. 816; Union Railway Company vs. Illinois Central Railway Company, 207 Fed. 745, certiorari denied, 231 U. S. 754, 34 Sup. Ct. 323, 58 L. Ed. 467.

In our first Brief, we pointed out that the District Court had jurisdiction of this cause, under the Declaratory Judgment Act, to declare the rights of the parties in this case. The District Court also had jurisdiction to quiet the title of the plaintiff to its stock in the Teton Cooperative Reservoir Company and to remove the cloud cast by the judgment. Therefore, relief by means of an injunction was not the only remedy available to the plaintiff in the instant case. The suit was properly before the District Court under two separate and distinct heads other than an injunction. Under these circumstances, the Court was not precluded from granting a preliminary injunction, if necessary, to preserve the rights of the parties, since the suit was properly before the Court. Southern Railway Company vs. Simon, 153 Fed. 234.

Since the District Court had the power to grant relief other than by injunction, it had the power to protect any judgment which it might render, such as to remove the cloud from the title of Brady Irrigation Company, or to declare the rights of the parties. Dietzsch vs. Huidekoper, 103 U. S. 496, 26 L. Ed. 497, Hickey vs. Johnson, 9 Fed. (2d) 498, Sand Springs Home vs. Title Guaranty and Trust Co., 16 Fed. (2d) 917.

In Ex Parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429, it was said:

> "It would be going far to say that, although the Circuit Court had power to grant relief by final decree, it had not power to preserve the rights of the parties until the final decree should be reached."

Respectfully submitted.

CHURCH & JARDINE,
J. W. FREEMAN,
J. P. FREEMAN,
ERNEST ABEL,
Attorneys for Appellant,
Brady Irrigation Company.